84-75
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BEULAH WILBUR,

Petitioner,

v.

THE SOUTHERN GALVANIZING COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

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Question Presented

Whether the District Court deprived the plaintiff of her right to a jury trial by granting judgment n.o.v. after she had presented evidence of discrimination beyond a prima facie case, and which rebutted the defendant's articulated non-discriminatory reason for her termination?

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IN THE SUPREME COURT
OF THE UNITED STATES

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v.

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Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE
FOURTH CIRCUIT COURT OF APPEALS

To The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Beulah Wilbur, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the Fourth Circuit

Court of Appeals entered in the above entitled case on April 16, 1984.

Question Presented

Whether the District Court deprived the Plaintiff of her right to a jury trial by granting judgment n.o.v. after she had presented evidence of discrimination beyond a prima facie case, and which rebutted the defendant's articulated non-discriminatory reason for her termination?

Opinions Below

The opinion of the Fourth Circuit Court of Appeals is unreported and is printed in Appendix A, infra page 21. The opinion and order of the United States District Court for the District of Maryland is printed in Appendix B, hereto, infra, page 32.

Jurisdiction

The judgment of the Fourth Circuit Court of Appeals was entered on April 16, 1984. The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254.

Statutes Involved

The statutes involved are 29 U.S.C. Sec. 626 and 631(a). These statutes are printed in Appendix C, hereto, infra, page 51.

Statement

This is an action under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. Sec. 621 et seq. This action was filed in the United States District Court for the District of Maryland pursuant to Section 7(b) of the ADEA (29 U.S.C. Sec. 626 (b)) and 28 U.S.C. Sec. 1337.

Plaintiff, Beulah M. Wilbur brought this action to recover damages from her employer, the Defendant, The Southern Galvanizing Company. The Defendant denied a discriminatory motive in firing the Plaintiff and contended that her discharge was the result of a reduction in force necessitated by ecomonic conditions.

Immediately prior to trial, the Court ruled on the Defendant's Motion for Partial Summary Judgment. The amount of damages, but not the issue of liability, was decided upon by oral agreement of counsel. The case was tried to a jury before the Honorable Edward S. Northrop on Arpil 20 through 22, 1983. At the close of all the evidence, the Defendant moved for a directed verdict challenging the sufficiency of Plaintiff's prima facie case and her rebuttal of the Defendant's evidence. The Court denied the motion and the case was submitted to the jury on the

issue of liability only. The jury rendered a verdict for the Plaintiff and Defendant timely filed a Motion for Judgment Notwithstanding the Verdict. Subsequently, Plaintiff filed motions for costs and attorney's fees. By opinion and order dated September 16, 1983, Judge Northrop granted Defendant's motion and entered judgment for the Defendant while denying Plaintiff's attorney's fee motion.

Plaintiff appealed that order to the Fourth Circuit Court of Appeals. The parties briefed and argued the issue of the granting of the Defendant's motion for judgment notwithstanding the verdict. The Court of Appeals affirmed the lower court's granting of the motion j. n. o. v.

Defendant, The Southern Galvanizing Company (Southern), a family owned business, was engaged in the business of coating steel for over thirty-five years. Defendant employed both union and non-

union employees to staff its plant and offices. Beginning in 1977, although Southern experienced both a decrease and an increase in its revenue, it incurred tax losses for the years 1977 through 1980. Defendant suggested that it took three steps with regard to the business to remedy this situation: raised the price of its products; borrowed money from its shareholders; and reduced its work force.

This reduction in work force affected both unionized and non-unionized employees. The union jobs were reduced by fifty (50%) per cent in 1979 pursuant to a collective bargaining agreement. The non-union positions were reduced through discharges and attrition from nineteen (19) to (11). Of the seven people who were discharged, two were older than forty and five were younger than forty.

Plaintiff, Beulah M. Wilbur, was

discharged without notice, in November, 1979. She was fifty-two (52) years old at the time of her discharge and had worked for the Defendant for thirty-five (35) years. For many years prior to her discharge, she acted as the switchboard operator and receptionist and performed other clerical duties. Plaintiff was the only member of the office staff (as opposed to supervisors and management) who was terminated. She was the oldest member of that staff. Plaintiff's duties were not eliminated, but remained, and were performed by other office personnel after her discharge particularly the executive secretary. Plaintiff testified that although the company suffered variations in its workload before she had never been laid off.

In April, 1979, Michael Hettlemen assumed the presidency of the company. At the same time, Robert Martin assumed the

position of general manager of The Southern Galvanizing Company. Plaintiff testified that shortly thereafter Mr. Martin began making certain remarks to her, such as "You're over the hill, why don't you go home?" and "When are you going to retire?". She further testified that at first she thought he was teasing, but that he made these remarks so often she began to worry, and finally realized that he was not teasing when she was fired. Mr. Martin testified that he did not recall making these discriminatory comments about Plaintiff's age.

Plaintiff believed that Mr. Martin had the authority to fire her. He was present at the meeting where she was discharged and he informed her of her discharge. Michael Hettleman, Defendant's president, testified that he was the person who made the decision to terminate Plaintiff. As general manager, however,

Mr. Martin was responsible for coordinating staff activities and dealing with employees. Both Mr. Hettleman and Mr. Martin testified that they discussed Plaintiff's termination.

On the day Plaintiff was discharged, Mr.Martin held a meeting with the remaining office staff and told them there would be no more changes. Shortly thereafter, Barbara Hettleman, wife of the President, was hired to perform part-time clerical duties. Then, on January 1, 1980, all of the salaried personnel received substantial raises.

Reasons For Granting This Writ

Plaintiff presented sufficient evidence to rebut the Defendant's articulation of a legitimate non-discriminatory reason for her discharge. Defendant suggested that Plaintiff was terminated from her position because the

company was suffering economically. Although Plaintiff did not offer additional rebuttal evidence on this issue, sufficient evidence was produced through cross-examination and evidence previously offered during her case-in-chief to justify the jury verdict.

Although the Trial Court concluded that the company's condition "demanded drastic action" and its "survival was threatened", the Defendant continued in business. Its accountant indicated that the company had been losing money or just breaking even for a number of years. In 1979, however, sales and revenues increased. Plaintiff testified that the company had a history of good and bad times, but that she had never previously been laid off even though the union staff might have been reduced. The accountant further testified that Plaintiff's position was a fixed cost type of position

which was not dependent on fluctuations in the number of production employees. The Defendant's business was continuing and Plaintiff's duties remained--the paperwork continued, the phones still rang, the files and the mail needed to be handled. Plaintiff also showed that any savings resulting from her termination was offset by the hiring of Barbara Hettleman and the raises given to the rest of the office staff shortly after her termination. Most importantly, Plaintiff showed discriminatory motive on the part of the Defendant's general manager, Robert Martin.

Plaintiff testified that shortly after Robert Martin was promoted to general manager, he began making discriminatory remarks concerning her age. At first, she was unconcerned because she thought he was kidding, but after repeated comments, she began to worry. Mr. Martin

discussed Plaintiff's discharge with his superior, Michael Hettleman, who supposedly made the decision to discharge Plaintiff.

Mr. Martin also testified that his duties as general manager required him to deal with the employees. He was present at the meeting where Plaintiff was fired and he did the actual firing. In addition, Plaintiff testified that she overheard a conversation between Mr. Martin and Mr. Hettleman on the day she was fired where Mr. Martin seemingly pushed Mr. Hettleman to the decision.

This evidence demonstrated that Mr. Martin was the moving force in Plaintiff's discharge. By agreeing to her termination, the Defendant, through Mr. Hettleman, aquiesced in this discriminatory act. Although the Defendant presented evidence of its economic condition through unaudited

financial statements, that economic picutre was not the total picture. Even a company in poor financial shape is capable of discrimination. Plaintiff was the oldest office staff member and the target of discriminatory remarks by her superior, the general manager. Although she did not hold the type of position which was dependent on staff fluctuations, she was discharged and her duties were distributed among women who, although protected by the ADEA, were younger than she. Plaintiff testified that, despite the company's supposedly dire circumstances, she was never given a reason for her discharge. She was effectively assisted out the door under the guise of a reduction in force. The Defendant then gave raises to the remaining staff and hired Barbara Hettleman. These raises, along with Mrs. Hettleman's salary, negated any purported

savings which resulted from Plaintiff's discharge.

Viewing the evidence in the light most favorable to the Plaintiff, the Plaintiff proved by a preponderance of the evidence that she was discharged because of her age. The jury had the opportunity to view the witnesses and to determine their credibility. The jury rightfully determined the facts and rendered a verdict for the Plaintiff. There was sufficient evidence to support that verdict.

The Fourth Circuit, however, affirmed the trial court's granting of the motion for judgment n.o.v. apparently relying on Lovelace v. Sherwin-Williams Co., 681 F.2d 230 (4th Cir., 1981) Lovelace, in turn, is based on this Court's opinion in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1980). Burdine requires only that the defendant

articulate a legitimate non-discriminatory reason for its employment actions to meet its production burden. By doing so, the defendant brings the motivational issue to a "new level of specificity," Burdine, supra, at 255. That is, considering only the opposing reasons offered by the parties, the employment decision would not have been made but for defendant's motive to discriminate because of plaintiff's age.

In essence, the Court of Appeals held that Plaintiff failed to meet the burden of proof on the ultimate issue. Lovelace addressed the issue of which standard to apply when assessing the sufficiency of the evidence on the motivational issue. By analogizing to cases involving the issue of causation, the Lovelace Court held that the applicable standard to allow jury consideration was probability and not mere possibility. When applying that

standard to this case, the trial court and the Court of Appeals ignored the totality of plaintiff's evidence, and appeared to weigh the evidence and to pass on the credibility of the witnesses.

In this case, it is certainly probable that considering the economic reason and Plaintiff's evidence, that Plaintiff would not have been discharged but for her age. Not only did she suffer ageist remarks from the general manager, but she saw her duties reassigned to the remaining staff and a younger woman, Barbara Hettleman was hired shortly after her discharge.

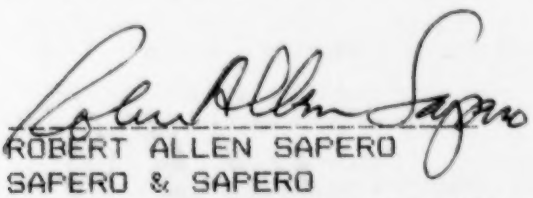
This case represents a deceptive form of discrimination and one which easily avoids detection. For this very reason, McDonnell-Douglass Corp. v. Green, 411 U.S. 792 (1973), and its progeny have structured a proof framework for private non-class employment actions. Motivation

is more objectively proven when statistics are available to prove wholesale termination of older employees. Unfortunately, discrimination also motivates individual terminations. If Mr. Martin's words were the only evidence provided by Plaintiff, there would be no age discrimination in this case. However, there was more: reassignment of her duties, partial replacement by a new employee, and raises to the salaried employees. Therefore, viewing the evidence in the light most favorable to the Plaintiff, she carried the ultimate burden and proved by a preponderance of the evidence that she was discharged because of her age.

Conclusion

For the foregoing reasons, this Petition for writ of Certiorari should be granted.

Respectfully submitted,



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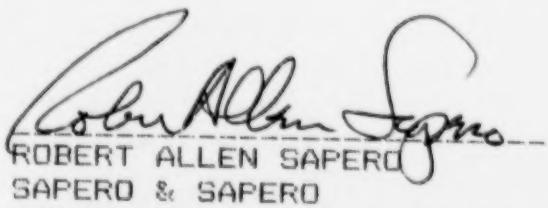
CERTIFICATE OF SERVICE

I, Robert Allen Sapero, attorney for Beulah Wilbur, Petitioner, herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on July 13, 1984, I served a copy of this Petition for Certiorari on The Southern Galvanizing Company, Respondent, herein, by mailing a copy in a duly addressed envelope with first class postage prepaid to Randolph C. Knepper, Esquire, Levin

Gann & Hankin, 10 Light Street, Baltimore, Maryland 21202, Attorney of record for the Respondent.



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Appendix A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 83-1984

BEULAH M. WILBUR,

Appellant,

vs.

THE SOUTHERN GALVANIZING COMPANY,

Appellee.

Appeal from the United Stated District Court for the District of Maryland, at Baltimore. Edward S. Northrop, District Judge.
(C/A N-81-2032)

Argued: February 9, 1984.
Decided: April 16, 1984.

Before MURNAGHAN and CHAPMAN, Circuit Judges and PECK, Senior Circuit Judge for the Sixth Circuit, sitting by designation.

Robert Allen Sapero (Sapero & Sapero) for Appellant; Randolph C. Knepper (Levin, Gann & Hankin, P.A.) for Appellee.

PER CURIAM:

In November 1979, Beulah M. Wilber, then-aged 52, was terminated from her position as a switchboard operator and receptionist by the Southern Galvanizing Company. On November 13, 1980, Wilbur initiated this action by filing a complaint which alleged that her termination was due to her age in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. Sec. 621 et seq. At a trial held in April 1983 on the issue of liability the jury returned a verdict for Wilbur. Wilbur appeals the district court's granting of Southern Galvanizing's motion for judgment NOV. Finding no error, we affirm.

I

Southern Galvanizing operates a plant for coating steel in Baltimore, Maryland. During the years from 1977 through 1980, Southern Galvanizing operated at a tax loss that totaled in excess of $500,000. In 1979, alone, Southern Galvanizing lost $309,000 from operations. In April 1979, the president of Southern Galvanizing, Irvin Goldboro, died. Goldboro's son-in-law, Michael Hettleman, assumed the presidency of the company. At about the same time, Robert Martin assumed the position of general manager.

In response to the financial difficulties, Southern Galvanizing's management took several actions: one was borrowing $270,000 from Michael Hettleman at a rate below market rate; another was reducing the company's work force. In 1979, the unionized plant personnel force

was reduced by half. Seven of the nineteen nonunion staff employees were terminated in 1979 and in 1980, while four others died or quit. The staff positions were not filled except for a part-time position filled by Barbara Hettleman, wife of the president of Southern Galvanizing. The youngest discharged staff employee was aged 23, the oldest aged 62. Five of the seven discharged staff employees were under the age of 40. Of the remaining eight staff employees, all but one was aged over 40; the exception was aged 38.

Wilbur, who had been employed as a switchboard operator and receptionist by Southern Galvanizing for thirty-five years, was one of five clerical employees. The clerical employees were nonunion staff employees. After the reduction in work force, only three clerical positions remained. Unlike the retained clerical employees, Wilbur lacked the skill and

training to perform all the duties of any of the remaining positions. Wilbur's duties were assumed by the remaining three clerks, which was made possible by the company's purchase of a modern switchboard system.

At trial, Wilbur testified that shortly after Martin became general manager, he began making remarks to her such as "You're over the hill, why don't you go home?" and "When are you going to retire?". Wilbur further testified that she initially thought that these remarks were not serious, but that she changed her mind after she was terminated. Martin testified that he did not make these remarks.

II

Where, unlike here, the plaintiff has presented either direct evidence or sufficient circumstantial evidence to support as a reasonable probability the

inference that but for plaintiff's age, she would not have been terminated, the proof scheme articulated in McDonnell-Douglass Corp. v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 455 U.S. 248 (1980), and applied to ADEA cases, e.g., Fink v. Western Electric Co., 708 F.2d 909 (4th Cir. 1983), need not be invoked. Cline v. Roadway Express, Inc., 689 F.2d 481, 484-86 (4th Cir. 1982). Where the evidence does not provide support for this inference as a reasonable probability, the initial question is whether the evidence suport the initial step of the McDonnell-Douglass proof scheme. Lovelace v. Sherwin-Williams Co. 681 F.2d 230, 240 (4th Cir. 1982).

In order for a plaintiff to establish a prima facie case of age discrimination in a reduction-in-force case, the plaintiff must prove that: (1) he is a

member of the protected age group; (2) at the time of demotion or discharge he was performing his duties at a level that satisfied his employer's legitimate expectations; (3) he was demoted or discharged, and (4) there is some evidence that the employer did not treat age neutrally. E.E.O.C. v. Western Electric Co., 713 F.2d 1011, 1014-15 (4th Cir. 1983). There is no dispute that the plaintiff has established the first three elements of a prima facie case. Viewing the evidence in the light most favorable to Wilbur, we concur in the district court's determinations that Martin's statements and the continued performance of same of Wilbur's duties by other clerical employees satisfied the fourth element and that Wilbur established a prima facie case of age discrimination.

Where a defendant is an ADEA action articulates a legitimate nondiscriminatory

reason for its action, the presumption of disrimination created by the establishment of a prima facie case is dissolved. Lovelace, supra, 708 F.2d at 239. The result of a defendant's articulation of a legitimate, nondiscriminatory reason for its action is that "the factural inquiry proceeds to a new level of specificity (i.e., whether the defendant's proffered reason is pretextual)". Fink, supra, 708 F.2d at 915 (citing Burdine, supra, 450 U.S. at 255). At this stage, the plaintiff has the burden of demonstrating that between the motives of age discrimination and the employer's proffered reason, "the circumstantial evidence supports as a reasonable probability the inference that but for claimant's age he would not have been demoted." Lovelace, supra, 681 F.2d at 244. This burden "merges with the plaintiff's ultimate burden of "persuading

the court that she has been the victim of intentional discrimination." Burdine, 450 U.S. at 256-57, 101 S.Ct. at 1095." Fink, supra, 708 F.2d at 915.

In the present case, Wilbur has failed to demonstrate that Southern Galvanizing's business justification for her termination was pretextual. There is no question that Southern Galvanizing suffered from serious economic problems that required drastic remedies. One remedy was a substantial reduction in the work force. Half of the unionized work force was terminated. Seven of the nineteen salaried employees were terminated and of the remaining twelve, four more either quit or died. Wilbur, a salaried employee, was one of the five clerical employees. Wilbur's principal duty, answering the switchboard, effectively was eliminated by the purchase of a modern switchboard. Her remaining

duties were easily assumed by the remaining three clerical employees who performed necessary and more complex tasks for which Wilbur had no training. As a result, Wilbur was a logical candidate for termination.

The evidence that Wilbur cites as indication age discrimination simply fails to overcome Southern Galvanizing's business justification. The award of cost-of-living raises to the remaining employees was shown not to be related to Wilbur's termination but to be necessary to maintain morale and to enable employees' salaries to keep pace with inflation. Finally, Martin's statements simply fail to indicate that but for age discrimination Wilbur would not have been terminated in light of Southern Galvanizing's business justification. To hold otherwise would result in an employer being subject to liability under the ADEA

for an adverse action taken against a protected employee whenever a supervisor makes a "ageist" comment regardless of the justification for the adverse action. We decline to so hold.

We are satisfied that the district court properly took into account the underlying facts in assessing the reasonableness of the inference that Wilbur's termination was motivated by age discrimination in light of the business justification articulated by Southern Galvanizing. As a consequence, we are satisfied that the district court properly granted judgment NOV.

Affirmed.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BEULAH M. WILBUR *

v. * CIVIL ACTION
NO. N-81-2932

THE SOUTHERN *
GALVANIZING CO.

*

MEMORANDUM

Mrs. Beulah Wilbur brought this action for money damages under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. Sec 621 et seq. The case was tried before a jury on April 20-23, 1983. The Southern Galvanizing Company, the defendant, moved for a directed verdict at the close of all the evidence arguing that the plaintiff failed to state a prima facie case, and that the plaintiff failed to rebut the company's proof that it acted with a proper business purpose. The defendant's motion was denied, and the jury returned a judgment in favor of the

plaintiff in the amount of $26,254.00. Mr. Robert Sapero, plaintiff's counsel, then requested reimbursement for costs ($322.40) and attorney's fees ($10,930.00).

Presently before the Court are the defendant company's motion for judgment notwithstanding the verdict and request that Mr. Sapero's attorney's fees be limited to $10,510.00. Of course, the defendant also takes the position that no attorney's fees or costs should be awarded if the motion for judgment notwithstanding verdict is granted. Because the written submissions of the parties are adequate, there is no need for a hearing on these matters. See Local Rule 6.

Briefly, the plaintiff, Beulah Wilbur, was employed as a switchboard operator and receptionist by the defendant company for approximately 35 years. In November, 1979, when she was 52 years old

and the oldest member of the office staff, she was terminated. The company's executive secretary, Geraldine Fisher, age 43, inherited the bulk of Mrs. Wilbur's duties. The remaining duties were assumed by Frances Novak, the accounts payable clerk, and June Trow, the billing clerk. This was possible in large part due to the company's purchase of a modern switchboard system.

Mrs. Wilbur was discharged at a time when the defendant company was suffering financially. The undisputed evidence showed that the company's tax losses for the years 1977-80 exceeded a half-million dollars. Of the several measures taken by the company to stabilize itself economically, a reduction in force was the most drastic. In 1979, the unionized workforce was reduced by more than 50%. Seven of the defendant company's nineteen fulltime salaried employees were also

discharged in 1979-80, and of the remaining twelve, four either died or quit. Exhibits introduced by the defendant company amply demonstrated that the discharge affected employees of all ages. The youngest was 23 years old; the oldest was 62. Noteworthy is the fact that five of the seven salaried employees who were discharged were under the age of 40. All but one of the eight remaining salaried employees were over 40, the other was 38.

The evidence also showed that Mrs. Wilbur was one of five "clerical" employees. When terminations were finally made, only three clerical positions remained. Mrs. Wilbur lacked the necessary skill and training to perform any of them in their entirety. Moreover, persons already under the company's employ were trained and working these jobs when Mrs. Wilbur was fired.

Other evidence of the defendant company's financial difficulties included, but was not limited to, the fact that Mr. Hettleman, the company president, restructured the defendant's operations so as to remove it from the Delaware, New Jersey, and New York markets. In other words, the Southern Galvanizing Company became a local, as opposed to regional, operation. Production shifts were cut and prices were increased by 18%.

Mr. Hettleman and his wife also made personal loans to the company totalling $270,000.00, repayable at 9%, which was well below the market rate. These loans were subordinated to other notes held by the defendant company's bank. Mr. Hettleman worked without a salary or other compensation.

The remaining clerical staff employees received cost of living salary increases effective January 1, 1980. The

sum total of these increases approximated Mrs. Wilbur's salary. Union salaries increased as well pursuant to the collective bargaining agreement which permitted the earlier described cutbacks. Nevertheless, the total salaries paid to employees from 1979 to 1980 decreased substantially.

Mrs. Wilbur's allegations of age discrimination were entirely the result of remarks she says were made to her by Mr. Robert Martin, General Manager of the Southern Galvanizing Company. Mrs. Wilbur testified that in the months prior to her firing, Mr. Martin said such things as "You're over the hill; why don't you go home?", and "When are you going to retire?" Mrs. Wilbur stated that at first she thought Mr. Martin was just joking with her.

Mr. Martin testified that he was responsible for the operation of the company from an operational standpoint. His duties included quoting jobs, receiving material, estimating production, coordinating staff activities, purchasing materials, and dealing with employees, including the union. Mrs. Wilbur was under the impression that Mr. Martin had the requisite authority to fire her, although Mr. Hettleman denied that, and testified that the actual decision to terminate Mrs. Wilbur was his. However, it was at a meeting with Mr. Martin and a Mr. Kilgore that Mrs. Wilbur received her final paycheck. Mrs. Wilbur testified that earlier in the day she overheard Mr. Martin say to Mr. Hettleman , "Well, she has a husband ... he can support her." Mr. Hettleman responded, "All right." Mrs. Wilbur also testified that when she was cleaning out her desk after receiving

notice, Mr. Martin said "You've got a husband, let him support you." Mrs. Wilbur then heard Mr. Martin say to the other staff employees, "There will be no more layoffs." Mr. Martin denied making any ageist remarks.

When terminated, Mrs. Wilbur was provided a letter of reference which read:

> To Whom it May Concern,
>
> This is to advise that Beulah Wilbur was employed by our company for more than 30 years, first in a light manufacturing operation and then for many years as a switchboard operator and mail and file clerk. Her performance was always satisfactory. Her attendance was excellent and her manners courteous and friendly. Due to a staff and systems realignment, her position has been eliminated. I would highly and unequivocally recommend Mrs. Wilbur and assure you that she will be diligent and completely loyal, as she was during her employment here. Should you require any further reference or

information, I would be pleased to provide the same.

Southern Galvanizing

Michael Hettleman
[1]
Executive Vice-President

The company first argues that judgment should be entered in its favor because the evidence did not establish a prima facie case under the ADEA. The United States Courts of Appeals have published several important decisions in this regard. The most recent by the Fourth Circuit was Fink v. Western Electric Company, 708 F.2d 909 (4th Cir. 1983), which reads in part as follows:

> There is little difference between the principles stated in Lovelace v. Sherwin Williams Co., 681 F.2d 230 (4th Cr. 1982) where the three elements of a prima facie case were (a) that the employee was covered by the Act, (b) that the

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[1] Mr. Hettleman became President of the Southern Galvanizing Company, a family owned firm, later in 1979.

employee suffered unfavorable treatment, and (c) that under the circumstances there has been a showing that the employee's age was a determining factor in the sense that "but for" the employer's motive to discriminate, the unfavorable treatment would not have occurred], and those enunciated in Williams v. General Motors Corp., 656 F.2d 120, cert. denied, 455 U.S. 943 (1982). Such difference as exists relates to the factual pattern of the two cases. Thus, Williams arose in the context of a reduction-in-force occasioned by the discontinuance of one of two shifts in the defendant's plant, rather than a demotion as in Lovelace. The Court in Williams found that the first two elements of an ADEA action in that case to be (1) that the plaintiff was within the protected class under the Act and (2) that " he was qualified to assume another position at the time of discharge or demotion". The ... Court then phrased its third element thus: "Our third requirement simply insists that a plaintiff produce some evidence that an employer has not treated age neutrally, but has instead discriminated based upon it. Specifically, the evidence must lead the factfinder reasonably to conclude either (1) that defendant consciously refused to consider retaining or relocating a plaintiff because of his age or (2) defendant regarded age as a negative factor in such consideration." 6556 F.2d at 129-30 ... It is evident that there is no basic difference in the test employed

in the two cases. Under both, motivation is the critical issue and only if age were "consciously," the "but for" reason for defendant's discriminatory action can a plaintiff prevail....

The presumption or inference arising from proof of a prima facie case dissolves in the ADEA case upon evidence adduced by a defendant of a legitimate, non-discriminatory reason for its action. Lovelace, 681 F.2d at 239. At that point the burden shifts back to the plaintiff and "the factual inquiry proceeds to a new level of specificity (i.e., whether the defendant's proffered reason is pretextrual)" and merges with the plaintiff's ultimate burden of "persuading the court that she has been the victim of intentional discrimination." [Texas Dept. of Community Affairs v. Burdine, 450 U.S. [248] at 256-57 [(1981)]. In assessing the evidence for sufficiency to compel jury submission under this burden, the court may consider all credible evidence, either "direct or indirect," offered under "ordinary principles of proof" including the evidence presented at the initial stage of proof. Lovelace, 681 F.2d at 240-41. Such evidence, "without resort to any special judicially created presumptions or inferences or inferences related to the evidence," must support with "substantial" or "reasonable probability," as distinguished from "possibility" or "speculation," the inference against

> the defendant's specifically advanced explanation. Cline v. Roadway Exp., Inc., 689 F.2d 481, 485 (4th Cor. 1982); Lovelace v. Sherwin-Williams Co., supra, F.2d at 239-242.

Fink v. Western Electric Company at 915-916.

Here, the Southern Galvanizing Company contends that Mrs. Wilbur failed to show that she was qualified to assume another position at the time of her discharge, step two of the Williams test. The company further contends that the law does not require special treatment be accorded to Mrs. Wilbur because of her age, and that as a result, the company had no obligation to retrain her.

Mrs. Wilbur argues that the requirements of a prima facie case are fluid and differ according to the factual circumstances. She suggests that the only issue here is the motivational question of whether she was terminated because of her age, and that under the circumstances of

this case, as in Lovelace, there was no need for her to show she was qualified to assume another position in order to establish a prima facie case. Her contention is that her job would not have been consolidated and she not fired if she were younger.

I agree with the defendants that the requirements of a prima facie case under the ADEA are flexible. Keeping in mind that a fundamental premise of the ADEA is that age is an unlawful factor upon which, among other things, job incumbency questions should be decided, this Court finds that this plaintiff did not have to show she was qualified to assume another position to state a prima facie claim. Rather, it was necessary that the evidence indicate the defendant company's continuing need for the same services and skills that the plaintiff provided. In other words under the circumstances of

this case, a prima facie showing was made when it was shown (a) that Mrs. Wilbur was covered by the Act; (b) that Mrs. Wilbur suffered unfavorable treatment; (c) that the Southern Galvanizing Company had a continuing need for the same skills as services that Mrs. Wilbur provided; and (d) that there was some evidence that Mrs. Wilbur's age was a determining factor in the sense that "but for" the employer's motive to discriminate, the termination would not have occurred. Cf. Loeb v. Textron, Inc. 600 F.2d 1003 (1st Cir. 1979). because Mrs. Wilbur's duties were not eliminated in their entirety (for example, she performed receptionist functions), and some motive was shown, this Court finds that a prima facie was established.

The second basis of the defendant company's motion for a judgment notwithstanding the verdict is that Mrs.

Wilbur failed to adequately refute the defendant's articulation of a legitimate reason for her discharge. Because the company offered a business justification for its actions, it was the plaintiff's burden to show that the proffered explanation was pretextual. See Fink v. Western Electric, supra. The only question was whether she met that burden.

Reviewing the evidence, there was no question that the Southern Galvanizing Company but back its labor force in 1979, the year the plaintiff was terminated. As described above, the president of the company fired over 50% of his union workforce. Seven of his nineteen full-time salaried employees were terminated and of the remaining twelve, four either died or quit. The vast majority of those discharged were under age 40. Further, the clerical staff was reduced from five to three.

Mrs. Wilbur was considered "clerical staff." Her primary duty was to operate an old fashioned switchboard. She became expendable, however, when the company purchased a modern, automatic swtichboard. Her non-switchboard duties were easily transferred to and assumed by other who were already performing more complex and necessary tasks. Mrs. Wilbur's switchboard responsibilities could be handled at their regular working desks. The persons who inherited the bulk of plaintiff's few duties was also protected by the ADEA. Distilled to its bare essence, the evidence was overwhelming that the plaintiff's position was eliminated at a time when economic conditions demanded drastic action. Her termination was one of dozens of firings which took place at the Southern Galvanizing Company in 1979, when the company's survival was threatened.

Plaintiff's argument that her discharge was "pretexual" because the remaining clerical employees received cost of living increases, the total of which approximated her own salary was just that, argument. There was no evidence, direct or circumstantial, that these increases were not deserved, that they were contingent on the plaintiff's firing, or that they somehow would not have been forthcoming had the plaintiff been retained. In fact, the evidence indicated that the raises were necessary to help the remaining employees keep pace with escalating inflation and to help boost morale. As to the allegations of ageist remarks, denied by Mr. Martin, they were not sufficient to overcome the business justification of the defendant, by a substantial or reasonable probability, even considering any possible inferences against the justification itself. The

plaintiff would have been fired regardless of discriminatory motives, even assuming they were present.

This Court thus finds that the defendant company's business justification was not successfully overcome by the plaintiff. "Pretext" was not shown. Moreover, the preponderance of the evidence clearly failed to indicate that "but for" an intention to discriminate against the plaintiff because of her age, she would have been retained. Mrs. Wilbur's job was eliminated because of economic circumstances and technological improvements in the company's front office. Other employees, older and younger, were also terminated. Like the plaintiff, many had worked for the Southern Galvanizing Company for years. Finally the defendant was under no obligation to retrain the plaintiff or to create a new position for her. It was

therefore error to submit this matter to a jury.

Accordingly, this Court finds that the plaintiff failed to successfully rebut the Southern Galvanizing Company's specifically advanced business justification and in addition, that the evidence taken as a whole, did not support a plaintiff's verdict.

This decision makes it unnecessary to resolve the "dispute" over attorney's fees, and the plaintiff's request for any such fees will be denied.

A separte Order will be entered in confirmation of this decision.

Edward S. Northrop
Senior United States District Judge

Dated: Sept. 16, 1983

Appendix C

29 UNITED STATES CODE.

Sec. 623. Prohibition of age discrimination.

(a) Employer practices. It shall be unlawful for an employer--

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act [29 USCS Sec. 621 et seq.]

(b) Employment agency practices. It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices. It shall be unlawful for a labor organization--

(1) to exclude or to expel from its memebership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its members, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to

deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; Participation in investigations, proceedings, or litigation. It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for

membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation unde this Act [29 USCS Sec. 621 et seq.]

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc. It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other

reasonable factors; seniority system; employee benefit plans; discharge or discipline for good cause. It shall not be unlawful for an employer, employment agency, or labor organization--

(1) to take any action otherwise prohibited unde subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act [29 USCS Sec. 621 et seq.], except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee

benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act [29 USCS Sec. 631(a)] because of the age of such individual; or

(3) to discharge or otherwise discipline an individual for good cause.

Sec. 631. Age Limits.

(a) Individuals at least 40 but less than 70 years of age. The prohibitions in this Act [29 USCS Sec. 621 et seq.] shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

No. 84-75

In The

Supreme Court of the United States

October Term, 1984

BEULAH WILBUR,

Petitioner

v.

THE SOUTHERN GALVANIZING COMPANY,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE PETITION SHOULD BE GRANTED UNDER SUPREME COURT RULE 17.1, WHERE PETITIONER HAS ARTICULATED NO SPECIAL OR IMPORTANT REASONS THEREFOR.

A. Whether the Petition should be granted where the basis for review would be concurrent factual determinations by two lower courts.

B. Whether the Petition should be granted where it raises no issues with ramifications for other cases, but has importance only to the parties.

II. WHETHER THE PETITION SHOULD BE GRANTED WHERE THE QUESTION PRESENTED BY PETITIONER WAS NEITHER ARGUED NOR BRIEFED IN THE TWO LOWER COURTS.

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THE SOUTHERN GALVANIZING COMPANY,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Respondent, The Southern Galvanizing Company, respectfully prays that this Court deny the petition for a writ of certiorari to review the April 16, 1984 judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS AND JUDGMENTS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, unreported, appears in Petitioner's Appendix A at pages 21-31. The appellate court affirmed the order of the United States District Court for the District of Maryland granting Respondent's motion for judgment notwithstanding the verdict. The memorandum opinion of the trial court appears in Petitioner's Appendix B at pages 32-50.

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RESPONDENT'S STATEMENT OF THE CASE

This is an action for damages resulting from termination of employment brought under the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* The facts material to this case are well summarized by the Fourth Circuit in its opinion at pages 22-25 of Petitioner's Appendix. The relevant facts are set forth in more detail in the memorandum opinion of the District Court at pages 33-40 of Pet. App.

Respondent disagrees with certain matters contained in Petitioner's Statement. With regard to the steps taken by Respondent to remedy its poor financial condition, it borrowed money not from its shareholders, but from its President, Michael Hettleman and from his wife, also an employee. Pet. App. at 36. While Petitioner asserts that Respondent's General Manager held a meeting of remaining office staff on the day of Petitioner's discharge and told them there would be no further changes, the General

Manager specifically denied making such a statement. Finally, Respondent disagrees with Petitioner's statement that "all of the salaried personnel received substantial raises." In fact, these employees received only cost of living increases. Pet. App. at 36.

Respondent deems it appropriate to apprise the Court of additional facts omitted from Petitioner's Statement in order to more fully set forth its financial condition at the time of Petitioner's discharge and the economics of that discharge and others in the same time period. Respondent's tax losses for the period 1977-80 exceeded a half-million dollars. Pet. App. at 34. Respondent's President, and his wife loaned the company $270,000.00 at a below market rate of 9% interest and subordinated repayment to notes held by a bank. Pet. App. at 36. Mr. Hettleman drew no salary or other remuneration during the period of the discharges. Respondent restricted the geographic area of its operations drastically, cut production shifts, and raised prices 18%. Pet. App. at 36.

Full-time clerical positions with Respondent, of which Petitioner had held one, decreased from five to three. The three remaining clerical employees all had specific skills which Petitioner lacked, such as computer and accounting capabilities. Pet. App. at 24, 30, 34. These remaining employees performed Petitioner's duties after her discharge in addition to their own. Petitioner's principal job task had been operating a manual telephone switchboard, which was replaced with more modern equipment. Pet. App. at 25, 29, 34. Both salaried and union employees received cost of living pay increases effective January 1, 1980, within two months of Petitioner's termination. Nevertheless,

Respondent's total salary and wage expenses decreased drastically from 1979 to 1980, due to substantial reductions in levels of employment. Pet. App. at 36, 37.

REASONS FOR DENYING THE WRIT

I. The Court Should Deny The Petition Under Supreme Court Rule 17.1, Since No Special Or Important Reasons Are Raised For Review.

A. The Court should not review concurrent factual determinations by two lower courts.

Supreme Court Rule 17.1 provides in part that "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor". The Petition for Writ of Certiorari does not specify what makes this case special or important such that the Court should exercise its discretion to grant certiorari. It is clear that the reasons identified in Rule 17 are not applicable to this case. There is no suggestion that the Court of Appeals for the Fourth Circuit decided this case in a way that conflicts with the decision of any other court. Indeed, because the opinions of both the District Court and the Court of Appeals are restricted to the facts of this case, it is hard to see how they could conflict with decisions of other courts and Petitioner does not so claim. Nor does Petition state that the Fourth Circuit departed from the usual course of judicial proceedings so as to call for this Court's supervision. The instances enumerated in sections b and c of Rule 17.1 are obviously inapplicable to the instant case.

The memorandum opinion of the District Court granted Respondent's motion for judgment notwithstanding the verdict on the alternative grounds that Petitioner had failed to rebut Respondent's proffered justification for her discharge and that the evidence as a whole did not support the verdict. The Court of Appeals affirmed, emphasizing that Petitioner "had failed to demonstrate that [Respondent's] business justification for her termination was pretextual". Pet. App. at 29. Petitioner herself recognizes the essentially factual nature of this dispute when she begins the section of her Petition entitled Reasons For Granting This Writ by stating that she "presented sufficient evidence to rebut the Defendant's articulation of a legitimate non-discriminatory reason for her discharge".

This Court has repeatedly held that a third judicial factual determination is not a sufficient reason for granting a petition for certiorari. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175 (1937) was a review of patent litigation by writ of certiorari. The Court refused to consider certain issues because they involved review of evidentiary findings. "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it . . . Moreover, the decision on that point rests on concurrent findings. They are not to be disturbed unless plainly without support." 304 U.S. at 178.

Similarly, the Court refused to disturb a factual conclusion concerning qualifications for naturalization in *Berenyi v. District Director, Immigration and Naturalization Service*, 385 U.S. 630 (1967). The *Berenyi* decision cited "this Court's repeated pronouncements that it 'cannot undertake to review concurrent findings of fact by two

courts below in the absence of a very obvious and exceptional showing of error". 385 U.S. at 635.

B. The Petition should not be granted because the case has ramifications only for the parties.

The Petition cites no rule of law which devolves from the decisions of the lower courts, the application of which might affect the outcome of other cases. Neither of the opinions of the lower courts has been published. An examination of the memorandum opinion of the District Court shows that it is carefully qualified by reference to the facts of this case. The trial court's recitation of those facts is detailed and occupies seven pages of Petitioner's Appendix. The District Court rejected Respondent's argument that Petitioner had failed to establish a *prima facie* case, thereby avoiding the one holding that could have served as precedent. Instead, the Court found that "the plaintiff failed to successfully rebut the Southern Galvanizing Company's specifically advanced business justification; and, in addition, that the evidence taken as a whole, did not support a plaintiff's verdict". Pet. App. at 50.

The Fourth Circuit also rendered an opinion confined narrowly to the facts of this case. Rather than forging some ruling applicable to other cases, the Court of Appeals chose to limit itself to an assessment of Petitioner's evidence on discriminatory animus and Respondent's evidence of business justification. "We are satisfied that the District Court properly took into account the underlying facts in assessing the reasonableness of the inference that Wilbur's termination was motivated by age dis-

crimination in light of the business justification articulated by Southern Galvanizing". Pet. App. at 31.

In sum, the decisions of the lower courts address only the interests of the parties to this litigation and have no ramifications for other litigants or potential litigants. In *Rice v. Sioux City Memorial Park Cemetary, Inc.*, 349 U.S. 70 (1955), this Court dismissed a writ of certiorari as improvidently granted where a decision would have carried no meaning for others in analogous situations. Citing Chief Justice Taft, the *Rice* Court reiterated that " . . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal". 349 U.S. at 79.

II. The Petition Should Not Be Granted Where The Question Presented Was Neither Argued Nor Briefed In The Two Lower Courts.

In her Petition, Petitioner defined the question presented as "Whether the District Court deprived the Plaintiff of her right to a jury trial by granting judgment n.o.v. after she had presented evidence of discrimination beyond a *prima facie* case, and which rebutted the defendant's articulated non-discriminatory reason for her termination?" The exact basis for the formulation of this question is not easy to discern, since the right to a jury trial is not even mentioned in the balance of the Petition. If we assume that granting judgment notwithstanding the verdict is claimed to violate the Seventh Amendment, it is clear that

no such constitutional infirmity results, even where the Court of Appeals overturns a verdict upheld by the trial court. *Neely v. Martin K. Eby Construction Co., Inc.,* 386 U.S. 298 (1967), reh. denied 386 U.S. 1027 (1967).

Without resorting to any consideration of the merits *vel non* of this issue, the Court should decline to consider it because Petitioner failed to raise it in either of the lower courts. In the District Court, Petitioner had the opportunity to raise any issue relating to the right to jury trial in her memorandum in opposition to defendant's motion for judgment notwithstanding the verdict. She failed to do so. It is apparent from an examination of the trial court's memorandum opinion that it did not consider the issue presented by Petitioner here.

Nor did Petitioner raise her jury trial issue in the Fourth Circuit. The subject of the Seventh Amendment was not broached in Appellant's Brief or in oral argument. Consequently, the Court of Appeals did not address the issue in its opinion.

In *Miree v. De Kalb County,* 433 U.S. 25 (1977), this Court vacated and remanded to the Fifth Circuit a decision in airplane injury and death litigation. One theory of liability was not considered on writ of certiorari because it was "neither pleaded, argued nor briefed either in the District Court or in the Court of Appeals . . . " 433 U.S. at 34. *See also, United States v. Lovasco,* 431 U.S. 783, 788 (1977) and *Emspak v. United States,* 349 U.S. 190, 198 (1955), where this Court expressed reluctance to consider issues not raised below. Although issues raised for the first time in the Supreme Court were considered in *Rogers v. United States,* 422 U.S. 35 (1975), Petitioner's counsel

there was not even aware of the new grounds for reversal until certiorari was granted. No such exceptional circumstances are present in this case. Whatever constitutional implications the judgment notwithstanding the verdict may have were available for briefing and argument in both of the lower courts.

CONCLUSION

Inasmuch as there are no special or important reasons for reviewing the case, the Petition for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, should be denied.

Respectfully submitted,

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